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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 651

HARRY SCHENNAULT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Harry Schennault, prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit which was entered in this case between the above named parties on December 20, 1952, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division. The petition for rehearing was denied on February 9, 1953.

THE OPINION BELOW.

The Circuit Court of Appeals for the Seventh Circuit affirmed the judgment sentencing the Petitioner to the custody of the Attorney General for a period of five years

on Count 12 of the indictment and fined him $2,000.00 on said Count, and to the custody of the Attorney General for a period of seven years on Count 13 of the indictment and fined him $5,000.00 on said Count; it was adjudged that the sentences run consecutively.

The opinion has not yet been reported. It appears in the record at pages 156-162.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Where an indictment consists of thirteen Counts, containing five groups of separate, independent transactions, each provable by different evidence, and where after motion made, and order of Court, the Government elected to proceed on a group of two Counts of the indictment, whether the effect of such election was not an abandonment, dismissal, or *nolle prosequi* of the remaining eleven Counts of the indictment.

2. Whether a rule of law announced by the Court of Appeals for the Seventh Circuit that "Criminal cases in the Federal Courts are governed by Federal Statutes and Federal decisions, and State Statutes and State decisions are inapplicable" is not such bad law as to require correction by the Supreme Court.

3. Whether accusation of a crime made by police to a prisoner is admissible in evidence or should be considered by the Trial Court against the defendant, where he fails to make denials of said accusation.

4. Whether narcotics found by Government agents in an unoccupied store, formerly in possession of a third person,

can be said to be possessed by the lessee of the said store without proof of any knowledge on his part of the presence of said narcotics in the said premises.

SUMMARY STATEMENT OF MATTER INVOLVED.

The record is quite long but the facts necessary to a disposition of this proceeding may be recited quite briefly.

The Petitioner was ~~tried~~ indicted in the District Court for the Northern District of Illinois, Eastern Division on thirteen Counts, divided into five groups of transactions, all charging a violation of the narcotic laws. The first three Counts charged the Petitioner with possession of 16 grains of heroin not in the original stamped package, with a sale of the said 16 grains of heroin and with knowingly possessing 16 grains of heroin imported into the United States contrary to law. The fourth, fifth and sixth Counts charged the same series of crimes with respect to 2.4 grains of heroin and 2 grains of cocaine, committed on June 26, 1951. Counts 7, 8 and 9 charged the same series of crimes with respect to 7.7 grains of heroin, committed on July 2, 1951. Counts 10 and 11 charged the same crimes, except for a sale, of 6,005.4 grains of heroin and 188.1 grains of cocaine, committed on April 10, 1951.

Counts 12 and 13 charged the same crimes, except for a sale, of 24.8 grains of heroin, committed on October 10, 1951.

The respective sales were made to different persons.

The Petitioner made a motion to compel the Government to elect the group of Counts on which it would go to trial, and pursuant to the order of Court to make an election, the Government elected to proceed on Counts 10 and 11 of the indictment. The Petitioner went to trial on the said Counts before the Honorable Philip L. Sullivan, who found him not guilty on said Counts.

The Petitioner was then tried on Counts 12 and 13, before the Honorable Patrick T. Stone, without a jury. Before the trial commenced, the Petitioner's attorneys objected to proceeding to trial on any of the Counts in the indictment; the motion was denied.

The important and essential facts are as follows: On October 10, 1951, at about 1:30 A. M., the Petitioner was standing outside of the doorway of a store of which he was the lessee. For a long time prior thereto the store had been occupied as a poultry store but was closed upon orders of the Chicago Board of Health the last two or three weeks. Three Chicago policemen passing by at the time entered the store and found a box located inside of a refrigerator showcase. In that box they found about 24 grains of heroin, which were not in the original stamped package nor from the original stamped package.

The Petitioner was arrested and at a branch of the Chicago police station, a Federal Narcotic Agent Christoph said to Harry Schennault, "Well, we finally got Harry Schennault, King of the dope peddlers" (Rec. 76). "Now with you out of the way we will have the second best man out of the way; we removed Amos Jones and you will follow" (Rec. 80). In response, the Petitioner just laughed (Rec. 80). The Agent continued, "Well, you have peddled these narcotics on the South side for a long time, and a lot of people have gone to jail for you, you put them out in front, you are peddling these narcotics on the South side, and I think this time it is your turn" (Rec. 81). The Petitioner laughed and made no comment.

Petitioner's attorney moved to have the foregoing testimony stricken and the Court replied, "It is perfectly proper. Objection overruled" (Rec. 81). With respect to the foregoing testimony the Court, at the time of the finding of guilty and of sentence, stated:

"And what did Schennault say? He said nothing.

> If I charged you with that offense you would be the first one to deny it; but not a word from Schennault'' (Rec. 133).

The Petitioner did not operate the poultry store himself but employed one, Henry Morgan, to do so (Rec. 99). The Petitioner came around only on week-ends to check the cash. The license of the poultry store had been in the name of Morgan since 1949 because he operated the business (Rec. 111). The Petitioner was the lessee, owned the equipment and paid the rent (Rec. 111).

Immediately after the Trial Court found the defendant guilty, he asked the District Attorney, ''What is this man's reputation?'' (Rec. 130). The District Attorney stated:

> ''This man is one of the largest peddlers, this man is a known dope peddler on the South side of Chicago, and has been for a number of years; and his method of operation is to have others dispense the narcotics, and he is behind the scenes so to speak, and he is the largest source of supply, according to the information I have, and the narcotic agents so say, if your Honor cares to interrogate them, on the South side, and the Government in this case is recommending the maximum sentence as to this defendant'' (Rec. 130, 131).

Then Mr. Christoph spoke up and said:

> ''He is notorious on the South side, and as I say, he is in the same category as Amos Jones, who had run the narcotics business on the South side for a long time; and his activities have been interstate and international, they extended to New York; we have information that he purchased narcotics from New York; and we have information of a person that was arrested in New York who delivered to Harry Schennault; and there have been about ten people who have gone to jail on behalf of Harry Schennault; there is a Sweet Willie and Delphine McGee who went to jail, as I mentioned on the stand, that was his woman, and at the time we entered the premises it was his premises.''

"The Court: That is, Harry Schennault?

"Mr. Christoph: Yes, sir, and his clothing was in there and receipts and everything; and she operated a shop for Harry Schennault at that time. The chicken shop has just been a front. The man is operating four or five automobiles, and he has no noticeable employment. Every time we would pick up a person involved in narcotics the name of Harry Schennault comes up as their source of supply, or in some connection with the source of supply" (Rec. 131).

Mr. Christoph called the Court's attention to the fact that Lieutenant Healy of the Narcotics Squad was present and that he had a large amount of information on Harry Schennault. The Clerk of Court asked the Judge whether he wanted Lieutenant Healy sworn, but the Court replied, "No, this is a pre-sentence investigation" (Rec. 132). The Court then asked Lieutenant Healy what he knew about Harry Schennault, and Lieutenant Healy replied:

"He is supposed to be known as the 'king of the dope peddlers' out on the South side, and various people I have talked to in the last few years down there have implicated him in the dope racket. One of the peddlers, Freddie Anderson, got four to eight years last July; he said he was working for Schennault. We had a girl who also told us she knew Schennault; and recently I had a girl in there by the name of Letha Harrison, one of his old girl friends, she said she had gone out with Schennault, had been picked up by him at various places.

"The Court: In your opinion he is one of the big operators in that locality?

"Lieutenant Healy: That is right." (Rec. 132.)

Contemporaneously with the pronouncement of sentence, the Trial Court said, "This is a very serious matter. I don't know of any worse crime, where he is destroying the lives of children. When you think of the children, men

like you destroying them by teaching them to use narcotics, the sooner you are removed from society, the better that society will be'' (Rec. 136).

REASONS FOR ALLOWANCE OF THE WRIT.

1 AND 2.

The Petitioner contended and argued, both in the Trial Court and in the Court of Appeals, that, after the Government had elected to proceed on Counts 10 and 11 of the Indictment, pursuant to an order of Court directing the Government to make an election, which order was entered on a motion of the Petitioner for that purpose, the effect of such an election was an abandonment, dismissal or *nolle prosequi* of the eleven remaining Counts, so as to bar a trial on Counts 12 and 13, the Counts on which the Petitioner was found guilty.

The Petitioner cited the following decisions as authority for that rule: *Mills* v. *State*, 52 Ind. 187, 188; *State* v. *Rush*, 27 P. (2d) 581, 584, 138 Kans. 465; *State* v. *Bodoin*, 96 So. 501, 503, 153 La. 641; *Kinney* v. *State*, 214 P. (2d) 726, 727 (Okla.); *State* v. *Reed*, 39 P. (2d) 1005, 1006; *People* v. *Tinnell*, 385 Ill. 537, 540; *Gilliam* v. *State*, 96 S. W. (2d) 86, 88 (Tex. Ct. App.); 1 Bishop Crim. Pro. Sec. 455, 456.

The Court of Appeals, in its opinion, said:

> ''Criminal cases in the federal courts are governed and controlled by federal statutes and federal decisions, and state statutes and state decisions are inapplicable. *United States* v. *Reid*, 53 U. S. 360-365; *Starr* v. *United States*, 153 U. S. 614; *Jones* v. *United States*, 137 U. S. 211, and *Simmons* v. *United States*, 142 U. S. 148.'' (Rec. 159.)

The decisions of the Supreme Court cited by the Court of Appeals do *not* announce that rule and are *not* authority

for such a rule. This rule is so startlingly erroneous that it requires correction by this Court, since it appears that, in hundreds of Federal criminal cases, Federal Courts of Appeal and the Supreme Court of the United States follow and cite State decisions and even decisions of the Courts of England. The cases named by the Court of Appeals as authority for the rule cite and follow State and English cases. In *Jones* v. *United States,* 137 U. S. 211, this Court cited a Massachusetts case at page 212, a number of English cases at page 213, a Rhode Island and a Maine decision at page 214. This Court, in the case of *Star* v. *United States,* 153 U. S. 613, followed a New Hampshire and a South Carolina decision, and followed a rule of the English Courts and of the Court of Pennsylvania (page 626) on the question whether a Trial Court may express an opinion on evidence in the giving of instructions.

In the recent case of *Gordon* v. *United States,* ..... U. S. ....., 97 L. Ed. (Advance p. 289), this Honorable Court, on the question as to whether an accused is entitled to the production of documents in the hands of the Government, stated that the reasoning of some holdings on the question, expressed by some lower Federal Courts, is outweighed by that of "highly respectable authority in State and lower Federal Courts in support of the view that an accused is entitled to the production of such documents." This Honorable Court found it "hard to withstand the force of Judge Cooley's observation in a similar situation" appearing in *People* v. *Davis,* 52 Mich. 569, 573. This Honorable Court cited and followed not only this Michigan decision but a Nevada and two New York decisions.

It is manifest that the rule announced by the Court of Appeals, to the effect that State decisions are inapplicable to Federal criminal cases, is so palpably and manifestly erroneous that it should be corrected by this Court.

Among the many decisions relying upon State opinions is that of *Willsman* v. *United States,* 286 F. 852. In determining the general rule that "Possession, to be incriminating, must be personal and exclusive," the Court cited no Federal cases, but mentioned five State decisions as bearing on the point (page 855).

The Court of Appeals, in discussing two other cases cited by the Petitioner, *Cochran* v. *United States,* 41 F. (2d) 193, and *Todd* v. *United States,* 48 F. (2d) 530, stated:

> "The federal cases cited by appellant are *Cochran* v. *United States,* 41 F. 2d 193, and *Todd* v. *United States,* 48 F. 2d 530. Neither is relevant to the proposition here under consideration. As a matter of fact, *Cochran* v. *United States* is referred to by the editor of Corpus Juris Secundum in a discussion on 'the effects of election' in 42 C. J. S., page 1158, as supporting the italicized portion of the following sentence:
>
> > 'The election to proceed on one count is held equivalent to a verdict of not guilty on the other counts, but not in the sense that it will bar prosecution on the remaining count which is similar to, or substantially the same as, those rejected.' "
>
> (Rec. 159.)

Here again the Court of Appeals grossly misinterpreted the rules announced in the foregoing authorities. The *Cochran* case was cited to show the effect of a *nolle prosse* and held, citing *Dealy* v. *United States,* 152 U. S. 539, 14 S. Ct. 670, 681, 39 L. Ed. 545, that where a count is *nolled,* it leaves the prosecution as though no such count had ever been inserted in the indictment.

In quoting 42 C. J. S., page 1158, the Court of Appeals overlooked the sentence just preceding the sentence which it cited. This overlooked portion states, "An election cures the defect arising from the multifarious character of the indictment, and eliminates or withdraws the rejected counts."

The Court of Appeals has so misinterpreted the effect of, and the language used in, the case of *Cochran* v. *United States* and that used in 42 C. J. S., page 1158, so as to require correction by this Court.

The Court of Appeals further quoted Rule 14 of the Federal Rules of Criminal Procedure as further authority for its conclusion that no error intervened by putting the Petitioner to trial on Counts 12 and 13 after an election had been made to proceed on Counts 10 and 11, on which the Petitioner had been found not guilty. Rule 14 reads:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election, or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

With respect to a trial on an indictment involving a single defendant, the Rule states that the Court may grant relief from prejudice by two methods: (1) The Court may order an election, or (2) The Court may order separate trials of Counts. The Trial Court ordered an election, and an election was made by the Government to proceed on Counts 10 and 11. Separate trials of the Counts were not ordered. It must have appeared to the Trial Court that the defendant was prejudiced by a joinder of the offenses.

This Honorable Court should construe the said Rule 14 for the purpose of determining whether an order directing an election of Counts and an order directing separate trials of Counts mean the same thing or different things.

As petitioner has heretofore pointed out, at the time he was arrested and was in custody at a branch station of the Chicago police, a Federal Narcotic Agent Christoph said to Harry Schennault, "Well, we finally got Harry Schennault, King of the dope peddlers" (Rec. 76). "Now

with you out of the way we will have the second best man out of the way; we removed Amos Jones and you will follow" (Rec. 80). In response, the Petitioner just laughed (Rec. 80). The Agent continued, "Well, you have peddled these narcotics on the South side for a long time, and a lot of people have gone to jail for you, you put them out in front, you are peddling these narcotics on the South side, and I think this time it is your turn" (Rec. 81). The Petitioner laughed and made no comment.

Petitioner's attorney moved to have the foregoing testimony stricken and the Court replied, "It is perfectly proper. Objection overruled" (Rec. 81). With respect to the foregoing testimony the Court, at the time of the finding of guilty and of sentence, stated:

> "And what did Schennault say? He said nothing. If I charged you with that offense you would be the first one to deny it; but not a word from Schennault" (Rec. 133).

It is manifest that the statement that Harry Schennault was the king of the dope peddlers is imbedded with the idea that the Petitioner had made many prior illegal sales of narcotics to the extent that he became known as the "King of the dope peddlers". The Court of Appeals, with respect to this testimony, said (Rec. 161):

> "Neither can we find merit in appellant's claim that highly prejudicial evidence and statements were allowed to be introduced in evidence. He says that evidence of the fact that defendant on his arrival at the police station, after his arrest, was greeted by city officers and by a federal employee of the Bureau of Narcotics, as 'king of the dope peddlers' was received, and was improper and prejudicial. We do not consider the admission of this evidence as reversible error in view of the convincing nature of the proof and the fact that the case was tried before the court."

There is no doubt that this prejudicial testimony was

considered by the Trial Court and deeply influenced him in his finding that the Petitioner was guilty.

The holding of the Court of Appeals that the foregoing evidence is not reversible error is in conflict with the decisions of the Courts of Appeal, particularly the decision in the case of *United States* v. *Lo Biondo*, 2 Cir., 135 F. (2d) 130, *Yep* v. *United States*, 10 Cir., 83 F. (2d) 41 and *McCarthy* v. *United States*, 6 Cir., 25 F. (2d) 298, which hold "to draw a derogatory inference from mere silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told, 'if you say anything, it will be used against you; if you do not say anything, that will be used against you.' "

III.

The entire evidence with reference to possession of the narcotics by the Petitioner is as follows: On October 10, 1951, at about 1:30 A. M., the Petitioner was standing outside of the doorway of a store of which he was the lessee. This store had been occupied for a long time as a poultry store. The Petitioner did not operate the store himself, but employed one, Henry Morgan, to do so (Rec. 99). The Petitioner came around only on week-ends to check the cash. The license of the poultry store had been in the name of Morgan since 1949 because he operated the business (Rec. 111). The Petitioner was the lessee, owned the equipment and paid the rent (Rec. 111). About two or three weeks prior to October 10, 1951, the store was closed upon orders of the Chicago Board of Health and remained unoccupied during that period. On the morning of October 10, 1951, three Chicago policemen passed by and entered the store and made a search. They found a box located inside of a refrigerator showcase and in that box found the 24 grains of heroin described in the indict-

ment. At the time of the search the Petitioner had accompanied the policemen into the store. At the time the officers took the box from the refrigerator showcase, the Petitioner objected to the search.

The reason the Petitioner was on the premises was because a friend, Emmett Spruell, had called him because Spruell had had a suitcase in the store with some clothes there and had gone to the store to get them but couldn't lock the door. It was for the purpose of locking the door that the Petitioner went to the premises (Rec. 100).

The foregoing constituted substantially all of the evidence introduced by the Government and the defendant with reference to the possession of the narcotics by the Petitioner and with reference to his knowledge that the heroin was on the premises.

Without any discussion or analysis of the evidence, the Court of Appeals stated that its examination of the transcript satisfied it beyond a shadow of a doubt that the Petitioner actually did have possession of narcotics as charged in Counts Twelve and Thirteen and that the proof was of a convincing nature (Rec. 161). This finding is in conflict with the rules, concerning possession and knowledge of possession, as announced by Courts of other circuits holding that possession of the fruits of crime, involves knowledge, dominion and control, with plenary power of disposal in the alleged possessor. The decisions of these Courts of Review, in which the opinion of the Court of Appeals for the Seventh Circuit is in conflict, are: *Grantello* v. *United States*, 8 Cir., 3 F. (2d) 117, 118, *Patrilo* v. *United States*, 8 Cir., 7 F. (2d) 804, 805, *Colbaugh* v. *United States*, 8 Cir., 15 F. (2d) 929, 931, *Bergedorff* v. *United States*, 10 Cir., 37 F. (2d) 248, 249, *Graceffo* v. *United States*, 3 Cir., 46 F. (2d) 852, 853, *Toney* v. *United States*, D. C., 67 F. (2d) 573, 574, *United States* v. *Wainer*, 7 Cir., 170 F. (2d) 603, 606.

The evidence was uncontradicted that this store had been managed by Henry Morgan, who was present therein until some date two or three weeks before the arrest of the Petitioner. There is no evidence that the Petitioner had been in that store during the two or three weeks in which it was closed and unoccupied. It is just as consistent to say that Henry Morgan possessed the heroin found in the store and left the same there as it is to say that the Petitioner knew that the heroin was in the store and, hence, constructively possessed the same.

The decision of the Court of Appeals is, therefore, in conflict with the holdings of other Courts of Appeal, among which is the case of *Graceffo* v. *United States*, 3 Cir., 46 F. (2d) 852, 853, which states:

> "It has been held by a long line of decisions in substance that, unless there is substantial evidence of facts which exclude every other hypothesis than that of guilt, it is the duty of the trial judge to direct the jury to return a verdict for the accused, and where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused."

The decision of the Court of Appeals for the Seventh Circuit on the question under discussion is also in conflict with the opinion in the case of *United States* v. *Russo*, 3 Cir., 123 F. (2d) 420, 422, and the numerous cases therein cited. In the last cited case, it was held:

> "In a case, therefore, such as the present where there is an utter want of any evidence as to the defendant's knowledge that the property was stolen (except for his constructive possession thereof), an inference of his innocence of any such knowledge is as readily deductible as is an inference of knowledge. It follows therefore that the evidence was insufficient to support a conviction."

IV.

In the summary statement of the matter involved, the Petitioner has set forth the prejudicial, unsworn, hearsay statements of certain persons of whom the Court inquired as to the Petitioner's reputation. The statements were vicious and created a most prejudicial climate and atmosphere surrounding the Trial Court at the time of sentence. It was utterly impossible for the Trial Court to be calm and dispassionate in sentencing the Petitioner, and accordingly, the Court sentenced the Petitioner to imprisonment for twelve years, just three years short of the maximum sentence permitted. The Petitioner realizes that this Court and the Circuit Courts of Appeals do not disturb the sentence imposed by a Trial Court, but in every such case where this rule has been announced, the Trial Court imposed sentence without any vicious and prejudicial statements made to him. The Trial Court, in refusing to try any other of the remaining counts of the Indictment, said, "In view of what I know about this man now, I think he is entitled to a trial before another judge" (Rec. 136). This is a frank admission that the Court was prejudiced against the Petitioner because of the prejudicial hearsay statements made to him, and is equally an admission that he was prejudiced at the time of fixing of sentence.

The Petitioner suggests that this is the first time a situation of this kind is called to the attention of this Honorable Court, and believes that this Court should direct that sentence be passed against a defendant by a Judge who is free from any prejudice against the defendant.

Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE F. CALLAGHAN,
Attorney for Petitioner.

MYER H. GLADSTONE,
Of Counsel.

APPENDIX.

Statutes Involved.

Title 21, United States Code, Section 174, so far as pertinent, provides:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or judisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26, United States Code, Section 2553(a) provides:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) (heroin) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as re-

quired by sections 3221 and 3220 shall be *prima facie* evidence of liability to such special tax."

* * * * *

Title 26, United States Code, Section 2557 (b)(1) provides:

"Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court."

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 651

HARRY SCHENNAULT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 156-162) is reported at 201 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1952 (R. 163) and a petition for a rehearing was denied on February 9, 1953 (R. 165). The petition for a writ of certiorari was filed on March 11, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim P.

QUESTIONS PRESENTED

1. Whether the Government, in electing two counts of a 13-count indictment "on which it would go to trial", was precluded from subsequently trying the remaining counts.

2. Whether the trial judge, in a trial without a jury, erred in admitting testimony that petitioner smirked or laughed when accused by narcotics agents of being the head of local narcotics traffic.

3. Whether the evidence is sufficient to support the finding of guilt.

STATUTES AND RULE INVOLVED

The Narcotic Drugs Import and Export Act of February 9, 1909, c. 100, § 2, 35 Stat. 614, as amended, 38 Stat. 276, 42 Stat. 596-597:

> Sec. 2(c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years.
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> * * * * *
>
> (f) Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evi-

dence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury [21 U.S.C. 174].

Internal Revenue Code:

Sec. 2553(a) It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax [26 U.S.C. 2553 (a)].

Sec. 2557(b)(1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court [26 U.S.C. 2557(b)(1)].

Rule 14, F. R. Crim. P.:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court

may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Seventh Circuit (R. 163) affirming the judgment of the District Court for the Northern District of Illinois (R. 137-138) finding petitioner guilty, after trial without a jury, and imposing consecutive sentences of five years' and seven years' imprisonment, and fines of $2,000 and $5,000, respectively, on counts twelve and thirteen of a 13-count indictment charging violations of laws relating to narcotics.

In the first nine counts of the indictment, petitioner was charged with three offenses on each of three dates, i.e., March 27, 1950, June 26, 1951, and July 2, 1951, the offenses consisting of purchase and possession of narcotics not in or from a stamped package (counts one, four, seven), sale of narcotics not in pursuance of the required written form of order (counts two, five, eight), and dealings with narcotics known to be unlawfully imported (counts three, six, nine), in violation of 26 U.S.C. 2553(a), 26 U.S.C. 2554(a), and 21 U.S.C. 174, respectively (R. 3-5). In counts nine and ten petitioner was charged with purchase and possession, and dealings with respect to 6005.4 grains of heroin and 188.1 grains of cocaine on April 10, 1951 (R. 6-7) and in counts twelve and thirteen he was charged with the same offenses as to 24.8 grains of heroin on October 10, 1951 (R. 7).

On the date set for trial, petitioner moved to compel the Government "to elect the group of counts on which to go to trial" and the Government elected "to proceed" on counts ten and eleven (R. 8). Before so proceeding, however, the Government was informed by the trial judge that trial of those counts would not be a "bar" (R. 13).

Petitioner, upon trial on counts ten and eleven, was found not guilty (R. 10). The cause was reassigned to another trial judge (R. 10-11), petitioner waived trial by jury (R. 11), and upon the Government's informing the court that it would proceed as to counts twelve and thirteen, petitioner reiterated an objection, made before the preceding judge, to trial of any further counts of the indictment (R. 12-13). The objection was overruled (R. 13).

The testimony of three police officers disclosed that, in driving on patrol in their district at one-thirty in the morning of October 10, 1951, they observed petitioner standing in the doorway of an empty, dark poultry store, his car standing by with motor running. The police officers swung back after a block or so, saw petitioner still there, alighted, and inquired. Petitioner stated that the store was his own store and that he was closing it up or "checking it up" (R. 14-15, 19, 35, 39-40, 45-46).

The officers searched petitioner. They saw no one else present. The door of the store was unlocked and the officers investigated the store. They observed a box in a refrigerator-counter. Peti-

tioner sought to hold the lid down against one officer, stating, "Wait a minute, you can't go in there" (R. 15, 27-28, 35-36, 47). The officers nevertheless took out the box and discovered that the box contained envelopes, measuring cups and other implements associated with the dispensing of narcotics (R. 15, 24-25, 29, 36, 38, 42, 47-48). Later analysis of the contents of one envelope disclosed 24.8 grains of heroin (R. 94-95).

Federal Narcotics Agent Gayles testified that he was present at an interview with petitioner at the police station, later on the same day, at which another agent Christoph stated "So you finally got Harry Schennault, king of the dope peddlers," to which petitioner responded, "I don't see why you want to say that about me, Christoph," and said, further, "They found that in my store, but they didn't find any narcotics on me." En route in a car to the Narcotics Bureau, the agents asked petitioner what he did for a living and about his four automobiles and real estate holdings. Petitioner responded that he used his head, had a pool room and some other business (R. 69-70).[1] Agent Christoph testified to substantially the same conversations, characterizing petitioner's responses as, "he just laughed" or "smirked" (R. 80-81, 91). He testified that when Gayles remarked about what the police had found, petitioner said "Well, they have got it," and denied that he had seen any narcotics (R. 80-81).

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[1] Petitioner objected to admission of the conversation as mere conclusion. The objection was overruled (R. 69-70).

Petitioner testified that he operated on commission a barber shop with pool room in the rear, and that he had rented the poultry store and operated it on commission, but that it had been closed by the Board of Health about a month before the early-morning events here in question (R. 98-99). He claimed that he had come to the store because an acquaintance, Spruell, had obtained the key from him late at night to take out a suitcase he had left in the store the preceding summer and had then phoned petitioner that he could not get the door locked again (R. 100, 112-113). Petitioner claimed that Spruell was still at the store when the officers arrived (R. 113-114) but petitioner did not produce him at the trial although he admitted he knew his address (R. 114). Petitioner had no explanation of the finding of the box except that Morgan, who had run the store for him prior to September, slept in the back "at times" (R. 102). Morgan was not produced at the trial although petitioner had had a letter from Morgan in Mississippi a month before (R. 106). Petitioner denied various details as to statements at the time of the seizure of the box (R. 119) and denied that there were any accusations by narcotics agents or any laugh or smirk in reply thereto (R. 104-105, 107, 117).

ARGUMENT

1. Petitioner contends that the order under which the Government first proceeded to trial on counts ten and eleven precluded any further trial on the remaining counts (Pet. 2, 7-10). The contention

is without merit. Rule 14, F. R. Crim. P. provides not merely one remedy for a prejudicial joinder of offenses but permits the trial court to "order an election *or separate trials of counts* * * * or provide whatever other relief justice requires" (Italics supplied).

The pertinent part of the order here involved reads as follows (R. 8):

> This day * * * the defendant Harry Schennault by his counsel * * * enters herein his motion to compel the plaintiff to elect the group of counts *on which to go to trial* and said motion is heard and the Government elects *to proceed* on Counts 10 and 11 of the Indictment herein. [Italics supplied.]

At the time of the motion the trial judge stated that the trial of counts 10 and 11 "would not be a bar" (R. 13). It is obvious that the word "elect" is used here, not to indicate an "election," as used in the first phrase of Rule 14, but rather a decision as to which of several, separate trials of counts is to come first.[2]

It is thus clear that what was contemplated and what took place was a separate trial of counts ten and eleven. There was no extinction of any remaining counts. Nothing in Rule 14 provides or indicates that when separate trials of counts are ordered and the Government elects which counts shall be tried first, such an election to go to trial

[2] See *United States* v. *Wallace Co.*, 336 U.S. 793, 802-803, in which this Court went to the record to determine the intended scope of a disputed order excluding evidence.

is the sort of election referred to in the first part of Rule 14. An example of the type of election which eliminates the non-elected counts would be a case in which a single transaction could be one of several offenses and, after the evidence is in, an election of one offense is made for submission to the jury; it would then constitute double jeopardy to allow a re-trial of the same facts on a charge of one of the other offenses that had been dropped by the election. Here, however, counts ten and eleven, tried before the trial of the counts now in question, related to a transaction that occurred on April 10, 1951, and involved 6005.4 grains of heroin and 188.1 grains of cocaine. Counts twelve and thirteen, which petitioner claims to have been somehow elected out of existence by trial of counts ten and eleven, related to the events of October 10, 1951, involving 24.8 grains of heroin. The remaining nine counts similarly related to separate dates and quantities of narcotics (*supra,* p. 4). No occasion appears for an election to designate the offense, as distinguished from an election of the counts to be tried first.[3]

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[3] The decisions cited by petitioner (Pet. 7-9) do not support his contention. In *Mills* v. *State*, 52 Ind. 187, 193, and *People* v. *Tinnell*, 385 Ill. 537, 541-542, the courts, far from dealing with an elimination of counts by reason of an election, rejected attempts, as here, to establish such an election upon the basis of inadvertent language or error. The remaining citations involved clear cases in which the remaining counts had been "struck" or "dismissed", or in which the defendant was himself seeking to claim multifariousness after an admitted election, or in which an election had been made after jeopardy had attached.

The contention that correction by this Court is required with respect to a statement in the opinion below that

2. Petitioner seeks to characterize his conduct in response to accusations of narcotics agents as being mere silence while under arrest and thus not an admissible subject of testimony (Pet. 2, 10-12). But the evidence in question disclosed, not mere silence but affirmative conduct in the nature of comments, denials, and laughing and smirking at the narcotics agents (*supra*, p. 6). Petitioner was not entitled to have his occasional denials and spoken comments isolated, for purposes of admissibility, from his laughter, facial expressions and occasional silences.[4]

3. The judgment is supported by ample evidence. Three police officers testified to a situation in which petitioner was standing in a dark doorway of his store at one-thirty in the morning with the motor of his car running. The store had been out of business for a month, and inside was a box of narcotics and paraphernalia from which petitioner attempted to hold back the officers. Petitioner asked the court to believe, without supporting evidence, that although he was so much the possessor of the store that his own presence was necessary to lock up the store at that hour, and although he tried to keep the police away from the place where the box was stored, the box and narcotics were not

"[c]riminal cases in the federal courts are governed and controlled by federal statutes and federal decisions, and state statutes and state decisions are inapplicable" (R. 159), is frivolous.

[4] Petitioner cites an instance in which the trial judge remarked on petitioner's silences (Pet. 11) but that remark was made during and only in connection with the argument as to the sentencing, after the judge had already made his finding of guilt in reliance upon the testimony of the three police officers (R. 129, 133, 135).

in his possession and were beyond the realm of his knowledge. Both the trial court and the Court of Appeals were convinced of petitioner's guilt (R. 161) and we submit that the evidence warrants no further review of their conclusions.[5]

CONCLUSION

The decision below is correct, there is no conflict of decisions, and further review is not warranted. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1953.

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[5] Petitioner also contends (Pet. 15), that this Court should direct re-sentencing because, upon pre-sentence inquiry, the trial judge heard statements of a police officer and of narcotics agents connecting petitioner with much activity in the narcotics traffic for which convictions had not been obtained. Since these statements might relate to issues of fact involved in further trial of the remaining counts, the trial judge expressed his unwillingness to try the remaining counts (R. 136). This is no indication that the trial judge was unfitted or deemed himself unfitted for the evaluation of a proper sentence. The court was entitled to consider general reputation in fixing sentence. Cf. *Williams* v. *New York*, 337 U.S. 241. He imposed a sentence three years short of the maximum that he might have imposed, and there is no occasion to "overrule sixty years of undeviating federal precedents * * * 'that the appellate court has no control over a sentence which is within the limits allowed by a statute' * * *." *United States* v. *Rosenberg*, 195 F. 2d 583, 604 (C.A. 2), certiorari denied, 344 U.S. 838, rehearing denied, 344 U.S. 889.

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